No. 72-1328

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

IRVING KAHN AND MINNIE KAHN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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We deem it appropriate to make a short reply in light of certain comments in respondents' brief which suggest that respondents were somehow improperly denied access to relevant information concerning the wire interception (Br. 27-28). We note at the outset that respondents do not contend that their charge of "arbitrarily continuing suppression of court files" (Br. 27) has any bearing on the proper resolution of the legal issues before this Court.

Respondents are correct in stating that they did not have access to the government's interim status report to the issuing judge, dated March 25, 1970. Respondents did, however, have access to the complete tape recordings of the interception. By order of March 10, 1971, the district court exercised its discretion under 18 U.S.C.

2518(8)(d) to make all of the recordings available.[1] In addition, respondents were furnished with copies of the wire interception application, affidavit and order; moreover, the inventory notice served on respondent Irving Kahn by delivery to respondent Minnie Kahn included a copy of the judge's order directing service of the inventory.[2] They thus had complete access to all material relevant to the validity of the wire interception. Indeed, since they had access to the tapes themselves, they had significantly more information than is required by the statute.

The interim report itself is irrelevant to any issue concerning the wire interception here.[3] The report did no more than summarize the government attorney's interpretation of the intercepted conversations. There is no statutory or other requirement for disclosure of such reports.[4] In light of the availability of the complete

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[1] The docket entries contained in the Appendix (pp. 1-2) are the extracts from the complete docket contained in the Appendix in the court of appeals. They do not include the March 10 order, which, we are advised by the office of the United States Attorney, is also entered in the district court's docket.

[2] On March 30, 1971, the district court extended the time for filing pre-trial motions to and including May 1, 1971 (App. 1). Respondents thus had ample opportunity after the material was available to them to file any motions. The motion to suppress was filed April 27, 1971.

[3] The report was included in the Appendix solely because it contained a convenient summary of the intercepted conversations (App. 26-28).

[4] The judge who issues the interception order determines whether to require interim reports. 18 U.S.C. 2518(6). If required, they may be in any form, including oral. See *United States* v. *LaGorga*, 336 F. Supp. 190, 194 (W.D. Pa.). The sufficiency of these reports is solely a matter for the issuing and supervising judge. *United States* v. *Ianelli*, 477 F. 2d 999 (C.A. 3), petition for certiorari pending, No. 73-64.

tape recordings and the fact that the interception had already terminated when the first and only report was filed, it is inconceivable that respondents could have been prejudiced in any way by their lack of access to this report.

Respondents claim that they do not have sufficient information to challenge the validity of the authorization to apply for the interception order (Br. 27, n. 3), and that they cannot determine whether notice was served on Mrs. Kahn "as required by 18 U.S.C. 2519" (Br. 28).[5] These claims are incorrect. Since they received copies of the wire interception application, affidavit, and order, they had all of the information available to similarly situated defendants who have raised the authorization issue in other cases. Also, all of the information which could be necessary to determine the sufficiency of the inventory notice was provided by the recordings, the copy of the order authorizing the interception, and the order directing service of inventory notice pursuant to 18 U.S.C. 2518(8)(d).

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[5] Section 2519 concerns post-intercept reports required to be filed by the issuing judge and the Department of Justice with the Administrative Office of the United States Courts. We presume respondents intended to refer to the inventory notice requirement of 18 U.S.C. 2518(8)(d), which directs the service of an inventory (advising that the interception was authorized, and giving the dates on which it occurred), on the persons named in the order that authorized the interception and on such other parties to intercepted conversations as the judge determines appropriate. In this case, the inventory was served on Mr. Kahn by a copy of the order directing service of the inventory on him, which contained all the information required by Section 2518(8)(d). The judge did not direct service of the inventory on Mrs. Kahn and she was not served, but she accepted the inventory served on Mr. Kahn on his behalf and obviously had full actual notice of the contents of the inventory.

Respondents' claim that, because of the government's "unwarranted secrecy," they "are left to speculate about basic questions" (Br. 28) is thus demonstrably incorrect. There was full and complete disclosure of all relevant material, well beyond the minimum required by the statute.[6]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

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[6] We note in addition only that *United States* v. *Rachel*, 360 F. 2d 858 (C.A. 7), cited by respondents (Br. 14) as indicating that ownership of property disclosed during an authorized search is relevant, was apparently based instead upon the theory that the improper arrest of the owner of the seized contraband tainted the subsequent search. In *Clifton* v. *United States*, 224 F. 2d 329 (C.A. 4), the court held that property seized during a search incident to a valid arrest may be used against the owner of the property, even though he was not present at the time of the arrest. See also *Drummond* v. *United States*, 350 F. 2d 983 (C.A. 8).